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CORPORATION/ O & G INDUSTRIES, INC., JV.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE CENTRAL DISTRICT OF CALIFORNIA

TUTOR-SALIBA CORPORATION/
O & G INDUSTRIES, INC., JV,

Plaintiff,

vs.

STARR EXCESS LIABILITY
INSURANCE COMPANY, LTD.,

Defendant.

No. 2:15-CV-01253

COMPLAINT FOR
DECLARATORY JUDGMENT

DEMAND FOR JURY TRIAL

1 Plaintiff Tutor-Saliba Corporation/O &G Industries, Inc., JV (“JOINT
2 VENTURE” or “Plaintiff”) brings this Complaint for Declaratory Judgment and
3 alleges as follows:

4 **DISCUSSION**

5 1. This is a dispute concerning insurance coverage and arbitration
6 provisions within a third layer excess policy on an Owner Controlled Insurance
7 Program for a public works project in the City of Los Angeles.

8 **PARTIES**

9 2. Plaintiff TUTOR-SALIBA CORPORATION/ O & G INDUSTRIES,
10 INC., JV is, and at all times material to this action was, a joint venture comprised of
11 Tutor-Saliba Corporation, a California corporation, and O & G Industries, Inc., a
12 Connecticut corporation, with its principal place of business in the Central District
13 of California.

14 3. Plaintiff is informed and believes that at all times material to this
15 action, Defendant STARR EXCESS LIABILITY INSURANCE COMPANY, LTD.
16 (“STARR” or “Defendant”), was a Delaware corporation with its principal place of
17 business in New York. STARR is a surplus lines insurer not admitted to transact
18 business in California.

19 **JURISDICTION**

20 4. This Court has jurisdiction pursuant to 28 U.S.C. §1332 and §2201.
21 There is complete diversity of citizenship between Plaintiff and Defendant, and the
22 amount in controversy exceeds the sum of \$75,000, exclusive of interest and costs.
23 An actual controversy within the meaning of 28 U.S.C. §2201 exists between the
24 parties.

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VENUE

5. Venue is proper in the Central District of California under 28 USC §1391(a), in that a substantial part of the events giving rise to the claims asserted herein occurred in this District, and defendant is subject to personal jurisdiction in this District at the time of commencement of this action.

UNDERLYING LITIGATION

6. This action arises from an underlying lawsuit brought by the City of Los Angeles against the JOINT VENTURE and other defendants in the California Superior Court for the County of Los Angeles, bearing case no. YC069354 (“City Lawsuit”). A copy of the First Amended Complaint is attached hereto as Exhibit “B.” For information purposes and without an admission of the facts by the JOINT VENTURE, the City Lawsuit alleges that the JOINT VENTURE and other defendants are legally responsible for alleged property damage sustained by the City of Los Angeles at the Los Angeles International Airport, including the following language alleging damage to existing property in Paragraph 15: “Additionally, the incorporation of these deficiencies in material and work into the overall construction of the runway damaged the previously constructed existing work and the necessary repair and replacement of the incorporated defective work and material has and will result in damage to the previously existing portions of old runway above the Sepulveda Tunnel and will prevent uninterrupted operations of the runway and maintaining the runway as intended”. Paragraph 16 goes on to allege that the JOINT VENTURE engaged in “damaging Plaintiff’s existing property” and “Plaintiff was and is further damaged when the deficient concrete and negligent means of placing and finishing the concrete was worked into previous sections of the work thereby physically damaging existing sections of the runway.” The City Lawsuit has been deemed “complex” by the Superior Court and remains at the earliest stages of litigation. The parties have yet to agree on an initial case

1 management order, and the parties in the lawsuit continue to name additional parties
2 and challenge pleadings. The JOINT VENTURE has filed its answer denying all
3 allegations made against it. The liability matters in that case have yet to be
4 determined.

5 7. The City Lawsuit involves a project for which the JOINT VENTURE
6 provided construction services that were insured for liability under an Owner
7 Controlled Insurance Program (“OCIP”) that included a commercial general liability
8 insurance policy with liability limits of \$2 million per occurrence, and three
9 following forms of excess liability policies with combined policy limits of \$200
10 million each occurrence. The JOINT VENTURE has provided notice of the lawsuit
11 to all of the insurers, as required by OCIP contract documents. Plaintiff is informed
12 and believes that one of those insurers is defendant STARR.

13 **THE STARR INSURANCE POLICY**

14 8. Plaintiff is informed and believes that Defendant STARR issued a
15 third-layer following form excess liability policy for the OCIP on March 16, 2007
16 (“Starr Policy”). Plaintiff is informed and believes that the policy provides excess
17 coverage for the policy period February 15, 2006 to August 15, 2010, with liability
18 limits of \$150 million each occurrence. Plaintiff is informed and believes that the
19 Starr Policy is excess above (1) a general liability policy issued by AIG Risk
20 Management, Inc. with liability limits of \$2 million per occurrence; (2) a first-layer
21 excess liability policy issued by Ace American Insurance Company with liability
22 limits of \$25 million each occurrence; and (3) a second-layer excess policy issued
23 by XL Europe Ltd. with liability limits of \$25 each occurrence.

24 9. Based on information and belief, Plaintiff was not provided a copy of
25 the Starr Policy before it commenced work on the project that is the subject of the
26 City Lawsuit. Plaintiff was informed only that the excess insurance provided by the
27 OCIP was following form to the commercial general liability insurance issued by
28

1 AIG Risk Management, Inc. Based on information and belief, Plaintiff was not
2 informed that the Starr Policy, unlike the commercial general liability policy it
3 purports to follow, has an arbitration provision. Plaintiff is informed and believes
4 that STARR did not deliver its excess policy to the OCIP administrator until more
5 than a year after work on the insured project commenced.

6 **STARR DEMANDS ARBITRATION**

7 10. On January 30, 2015, STARR sent a letter to the Vice President for
8 Risk Management of Tutor Perini Corporation, parent company of Tutor-Saliba
9 Corporation, and the General Counsel of O&G Industries, Inc. demanding
10 arbitration of plaintiff's entitlement to liability coverage under the Starr Policy
11 ("N.Y. arbitration"). The letter cited an arbitration provision in the Starr Policy that
12 STARR claims it may enforce to compel the JOINT VENTURE to submit to
13 binding arbitration of its right to indemnification for its potential liability to the City
14 of Los Angeles before the City Lawsuit has been resolved.

15 11. Plaintiff is informed and believes that the demand for arbitration even if
16 valid is premature on its face, and was delivered to the JOINT VENTURE primarily
17 for purposes of harassing the JOINT VENTURE and interfering with the JOINT
18 VENTURE's ability to protect itself against the City Lawsuit. It is premature for
19 the primary reason that until the underlying City Lawsuit establishes the validity of
20 the claims and the nature of the damages under those claims, it is factually
21 impossible to determine the scope of coverage. It is known, however, that at this
22 time that the allegations raised by the City of Los Angeles in the City Lawsuit
23 suggest that conduct of the JOINT VENTURE and others resulted in damages to
24 adjoining property and other claims that clearly are covered by the STARR policy.
25 While those allegations are denied, a final determination remains pending and will
26 remain pending until the City Lawsuit is adjudicated.

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AIG/STARR PATTERN OF FORUM SHOPPING AND HARASSMENT

12. Plaintiff is informed and believes that STARR is a member of the AIG group of insurance companies, and therefore an affiliated entity of AIG Risk Management, Inc., which issued the OCIP's commercial general liability policy.

13. AIG on its own and by and through its subsidiaries has engaged in a pattern of filing lawsuits around the various District Courts in order to secure a premature and improper judicial determination denying insurance coverage to the JOINT VENTURE (and other companies) under its AIG and STARR policies. In fact, the N.Y. arbitration constitutes the second attempt by AIG/STARR to improperly and prematurely challenge coverage to the JOINT VENTURE for its potential liability to the City of Los Angeles on the LAX Project, first through the AIG primary coverage and now by challenging the excess or "following" coverage issued by its company, STARR.

14. For example, AIG Risk Management, Inc. has filed a premature action for declaratory judgment in the United States District Court for the Northern District of California seeking a judicial declaration that it owes neither a duty to defend nor a duty to indemnify the City Lawsuit ("DJ Action"). Plaintiff is informed and believes that STARR is acting in concert with AIG Risk Management, Inc. or is otherwise its agent or alter-ego and is engaged in a concerted effort to harass the JOINT VENTURE and interfere with the JOINT VENTURE's ability to protect its interests by filing multiple lawsuits challenging coverage and compelling the JOINT VENTURE to defend both the premature DJ Action in the Northern District of California and the premature arbitration in the State of New York, while the JOINT VENTURE attempts to concentrate on defense of the City Lawsuit in the Superior Court of California, Los Angeles. If permitted to move forward, STARR'S N.Y. arbitration would be the third action in as many jurisdictions that the JOINT VENTURE would have to expend resources that concerns or relates to the described policies of insurance.

CLAIM FOR DECLARATORY JUDGMENT

15. Plaintiff repeats and incorporates the allegations of paragraphs 1 through 14.

16. Plaintiff is informed and believes that STARR is seeking to compel arbitration under Endorsement No. 2 [FF-03] of the Starr Policy entitled “Arbitration & Choice of Law” (“Arbitration Endorsement”). A copy of the Arbitration Endorsement is attached as Exhibit A.

17. The Arbitration Endorsement provides in pertinent part: “Any dispute arising out of or in connection with this Policy including, without limitation, its interpretation or validity, whether arising before or after termination of this Policy, and whether between the Insurer and the Insured or any person or entity deriving rights through or asserting rights on behalf of the Insured, shall be submitted exclusively to arbitration in the manner set forth herein and the arbitration award shall be the exclusive remedy available under this Policy.”

18. The Arbitration Endorsement provides further, under the heading “Choice of Law and Forum”: “Any arbitration instituted pursuant to this provision shall be held in New York, New York, unless otherwise agreed to by the members of the arbitration panel.”

19. The Arbitration Endorsement provides further that the arbitration will take place before a panel of three arbitrators; that none of the arbitrators has the power to award extra-contractual, punitive or exemplary damages; and that each of the parties to the arbitration is deemed to have waived its right to extra-contractual, punitive or exemplary damages.

20. An actual and present controversy exists between Plaintiff and STARR concerning whether the Starr Policy’s arbitration, forum, choice of law and waiver of damages provisions are valid and enforceable; whether the insurance layers above

1 take precedence, and whether STARR has a right to compel arbitration before the
2 City Lawsuit has resolved.

3 21. Under the Federal Arbitration Act, the District Court determines certain
4 preliminary matters such as the enforceability of arbitration, forum, choice of law,
5 and waiver of damages provisions as conditions of arbitration. Plaintiff contends
6 that the arbitration requirement is invalid and unenforceable and that it is entitled to
7 a judicial forum to litigate the coverage issues. Plaintiff further contends that the
8 New York forum provision is invalid and unenforceable. Plaintiff further contends
9 that the choice of law provision, to the extent STARR contends it has selected New
10 York law, is invalid, unenforceable, and inapplicable to the Court's preliminary
11 determinations regarding the enforceability and validity of the arbitration and forum
12 clauses. Plaintiff further contends that the provision purporting to waive the
13 insured's right to pursue extra-contractual, punitive or exemplary damages, as a
14 condition of engaging in arbitration, is invalid and unenforceable, improperly
15 depriving Plaintiff of legal remedies for STARR's tortious conduct.

16 22. As a non-admitted insurer, STARR agreed to a California judicial
17 forum as a condition of doing business in California, and is required to submit to
18 suit in a court of law in California when issues of indemnification are ripe. Plaintiff
19 contends that issues of indemnification are not yet ripe, as discovery has yet to
20 commence in the City Lawsuit, the parties to that lawsuit are far from a
21 determination of liability and damages, and it is both premature and prejudicial to
22 impose on Plaintiff the obligation to litigate the duty to indemnify before the City
23 Lawsuit has concluded.

24 23. Plaintiffs are informed and believe that STARR contends that the
25 policy provisions regarding arbitration, forum, choice of law, and waiver of
26 damages are valid, enforceable, and applicable, and that the duty to indemnify is
27 ripe for determination.
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24. In the event that this Court determines that Plaintiffs are entitled to a judicial forum in this Court to litigate STARR's duty to indemnify, Plaintiff requests that the court stay the remainder of this lawsuit until the City Lawsuit has finally resolved. Alternatively, if this court determines that Plaintiff must submit to arbitration, Plaintiff requests that this Court order that the arbitration take place in California, and that it stay the arbitration proceedings until the City Lawsuit has finally resolved.

WHEREFORE, Plaintiff prays for judgment as follows:

1. A declaration regarding whether the arbitration requirement is valid and enforceable, and specifically a declaration that that the arbitration requirement is invalid and unenforceable, and Plaintiff is entitled to a judicial forum in which to litigate the duty to indemnify under the Starr Policy;

2. A declaration regarding whether the New York forum clause is valid and enforceable, and specifically a declaration that the clause is invalid and unenforceable, and Plaintiff is entitled to a California forum;

3. A declaration regarding the applicable law for interpretation and enforcement of the Starr Policy, and specifically a declaration that California law applies to the preliminary issues regarding the enforceability of the arbitration and forum clauses, and to the duty to indemnify;

4. A declaration regarding whether the waiver of extra-contractual, punitive or exemplary damages provision is valid and enforceable, and specifically a declaration that the clause is invalid and unenforceable;

5. In the alternative, a declaration or order staying or enjoining the New York Arbitration until final liability has been established in the City Lawsuit;

6. After final liability has been established in the City Lawsuit, a declaration that STARR must indemnify the JOINT VENTURE under the STARR policy for any liability in the City Lawsuit;

1 7. In the alternative, pursuant to California Insurance Code §1772 and other
2 law, if Arbitration is required to proceed at any time, any arbitration is ordered to be
3 conducted in Los Angeles, California with the application of California law;

4 8. Costs of suit incurred herein; and

5 9. Such other and/or different relief as the Court may deem just and proper.

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8 Dated: February 20, 2015

CASTLE & ASSOCIATES
A Professional Law Corporation

9 By: _____ / s /

10 Nomi L. Castle

11 David Romyn

12 Robert Nida

13 Attorneys for Plaintiff the TUTOR-
14 SALIBA CORPORATION/ O & G
15 INDUSTRIES, INC., JV.
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DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury on all issues triable by a jury as provided by Rule 38(a) of the Federal Rules of Civil Procedure.

Dated: February 20, 2015

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/ s /
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